United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7027

United States Court of Appeals
For the Second Circuit

HARRY LEWIS,

Plaintiff.

against

TELEPROMPTER CORP.,

Defendant.

INDEPENDENT INVESTOR PROTECTIVE LEAGUE,

Plaintiff-Appellant.

against

TOUCHE ROSS & COMPANY,

Defendant-Appellee.

I. WALTON BADER,

Appellant.

against

TOUCHE ROSS & COMPANY,

Defendant-Appellee.

APPELLANT'S REPLY BRIEF

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Plaintiff

against

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DOCKET NUMBER
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I.WALTON BADER

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Defendant-Appellee

APPELLANTS' REPLY BRIEF

The arguments made by the Appellee herein in its brief require a reply. This reply brief is therefore submitted.

STATEMENT OF THE CASE

Based upon all of the evidence involved herein it is clear that:

1. The time for compliance with the Order of the District Court was September 9th, 1974 and not September 5th, 1974 and hence the circumstances involved on September 5th, 1974 were irrelevant to the issues in this case.

2. Even if it be assumed, arguendo, that the time for compliance with the Order of the District Court was September 5th, 1974 it is clear that the answers of all of the plaintiffs were executed prior to that day so that there was no wilful refusal to make discovery and no sanctions were warranted.

3. GARY MICHAEL was not a plaintiff in this case after the Amended Complaint was filed.

4. The Court's use of its notes in this case is a clear violation of law and of Federal Rules of Evidence and no objection is necessary to establish this.

5. The false affidavit and false testimony given by ENO in this case constitute unclean hands and would avoid, in any event, imposition of attorneys fees and expenses on the plaintiffs.

6. There was no false testimony in this case in any material matter.

FACTS

The Appellee, in its brief, states that the Appellants have not discussed the facts. The material facts are, of course, set forth on pages 6-14 of the Appellants' Brief but, in view of the fact that many facts have not been presented in the Appellees' presentation, the material facts will be set forth herein. In order to aid the Court in the chronology, the fact involved, the support therefor, and the date involved will be set forth. This will be done in tabular form.

DATE OF ACTION	FACT	SUPPORT
February 13, 1974	Order of Judge Owen granting unlimited extension of time to answer amended complaint	JA-226-227
June 11, 1974	Answers to Interrogatories of Defendant Touche Ross served and filed	JA-263-277
August 2, 1974	Motion for Further Answers to interrogatories filed by defendant TOUCHE ROSS	JA-235-248
August 16th, 1974	Motion by defendant Touche Ross granted by Judge Owen compliance within 20 days	JA-293
August 15th, 1974	Letter written to GARY MICHAEL, MARTIN C. RANDOLPH and MICHAEL FAGAN asking for information on stock purchases and sales	JA-387-388
August 29th, 1974	Copies of proposed answers to interrogatories based upon information furnished plaintiffs' attorneys sent to plaintiffs RANDOLPH and	

DATE OF ACTION	FACT	SUPPORT
August 29th, 1974	FAGAN and to GARY MICHAEL by mail	JA-106-107 [Blacker]
August 30th, 1974	FAGAN mails signed copies of interrogatory answers to plaintiffs' attorneys	Affidavit on MICHAEL FAGAN on Motion to Remand
September 3rd, 1974	RANDOLPH signs original answers to interrogatories before Notary Public in California and mails these to plaintiffs' attorneys at Post Office at 1PM on that date.	JA-422-425 JA-605-606
September 5th, 1974	SANDS signs original answers to plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE, BADER notarizes answers and executes Certificate of Mailing. Copies of documents mailed to all defendants' attorneys	JA-68 (Sands) JA-6,7(Bader) JA-476-544
September 5th, 1974	SANDS, without authority, mails unconformed copies of interrogatory answers of RANDOLPH, MICHAEL and FAGAN only to ROSENMAN, COLIN firm. He also reports to BADER that the "Teleprompter" papers have come in.	JA-76 (Sands) JA-19 (Bader) JA-418-419
September 5th, 1974	BADER leaves office for St. Louis Missouri	JA-24-25 (Bader) JA-475
September 6th, 1974	BADER in St. Louis Missouri	JA-475

DATE OF ACTION	FACT	SUPPORT
September 9th, 1974	BADER askes SANDS to check mail since he will not be in his office on September 9, 1974. SANDS reports correspondence from the ROSENMAN, COLIN firm, BADER telephones this firm and informs the firm that he will send copies or original answers in a few days.	JA-28,29,27 (BADER) JA-579,580
September 10th, 1974	BADER arrives in his office, finds copies of answers have been sent by inadvertence, serves proper copies of RANDOLPH answers on all attorneys (except ROSENMAN, COLIN)prepares affirmation of service and files original answers.	JA-49-50 JA-425
September 11th, 1974	BADER delivers original answers of INDEPENDENT INVESTOR PROTECTIVE LEAGUE and RANDOLPH to NEVLING of ROSENMAN COLIN firm and serves Motion to Extension of time for answers of FAGAN & MICHAEL.	JA-195-196 (Nevling) JA-425 JA-384-388a
September 13th, 1974	TOUCHE ROSS makes motion for Rule 37 sanctions and for further extensions of time returnable September 20th, 1974.	JA-294-372
September 17th, 1974	Further information with respect to RANDOLPH's purchases and sales of TELEPROMPTER stock supplied.	JA-565-578

DATE OF ACTION	FACT	SUPPORT
September 20th, 1974	Oral Argument before Judge Owen on Rule 37 Motion by defendant TOUCHE ROSS (other defendants did not so move)	Conceded
October 9th, 1974	Notice of Voluntary Dismissal of plaintiff RANDOLPH filed with Clerk of District Court (so ordered by Judge Mac Mahon)	JA-229-230
October 17th, 1974	Notice of Voluntary Dismissal of plaintiff FAGAN and of GARY MICHAEL filed with Clerk of District Court,	JA-231
October 18th, 1974	Objections filed by defendant TOUCHE ROSS to Notice of Voluntary Dismissal of plaintiff FAGAN and of GARY MICHAEL	JA-232
October 28th, 1974	Further Notice of Voluntary Dismissal of plaintiff FAGAN and of GARY MICHAEL Filed with Clerk of District Court. (so ordered by Judge MacMahon on January 23rd 1976)	JA-228
November 4th, 13th & 14th, 1974	Hearings held by Judge Owen purportedly to inquire into the circumstances of the receipt of the RANDOLPH original interrogatory answers on September 5th, 1974.	Conceded
January 9th, 1974	Judge Owen issues Order and Opinion awarding sanctions against I.WALTON BADER and the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE.	Canceded

POINT ONE

THE TIME FOR COMPLIANCE WITH THE ORDER OF JUDGE OWEN WAS SEPTEMBER 9th, 1974 AND

NOT SEPTEMBER 5th, 1974. HENCE ALL OF THE FACTS AND CIRCUMSTANCES PRIOR TO SEPTEMBER 9th, 1974 ARE IRRELEVANT AND IMMATERIAL.

As pointed out in the Appellants' Brief the time for compliance with Judge Owen's Order was not September 5th, 1974 but was September 9th, 1974. If such was, in fact, the case, then it would be irrelevant whether the RANDOLPH answers were received on September 5th, 1974 or at a later date. It would also be immaterial if the answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE were executed on September 5th, 1974 or at a later date.

The Appellee, in attempting to avoid this result, makes the following points:

1. The decision was announced from the bench on August 16th, 1974 by the Court.

2. The Appellants conceded that the date for compliance was September 5th, 1974.

3. The Order speaks from the date of entry and not from the date of service thereof with Notice of Entry.

All of these points are just not so.

While the Court, on August 16th, 1974, did state, from the bench, that he was inclined to grant the motion and to give the Appellants twenty days to comply the memorandum decision was not read to the Appellants or shown to them.

Hence, of course, the Appellants could not have any notice of this Order until Notice of Entry thereof was sent to the plaintiffs by the Clerk of the Court. This was concededly done by mail on August 16th, 1974. The Court, of course, had it so desired, could have set the time for compliance as "Twenty days from Notice of Entry of the Order" had it so desired. However, having not done so the usual rules apply.

It is quite true, of course, as the Appellants state and concede, that the Appellants' Attorney believed that the date for compliance was September 5th, 1974. He so testified at the hearings. However a study of the law indicates the contrary and, of course, it is the law applicable that applies and not any belief on the part of counsel.

The cases support the Appellants' Position including the cases cited by the Appellee. Thus Clements vs Florida East Coast Railway Company 473 Fed(2nd) 668 involved the reversal of an Order of a District Court dismissing an action. In that case (not pending in this Circuit) the Court held that the Order of the District Court spoke from the date of its filing with the Clerk because the local custom in that Circuit apparently adopted such a Rule. In reversing the District Court the Circuit Court held as follows:

> " * * * It appears to us that if the phrase has no such meaning as a matter of law, the court will face the question whether as a matter of construction the order unambiguously means either date of filing or date of execution, or whether it is ambiguous, and, if it is ambiguous, the meaning to be given to it. Local Rule and custom may bear on this also. Finally, whether the order is ambiguous or not, the court may wish to consider whether plaintiff should be allowed relief for 'excusable neglect", (emphasis supplied).

Local custom is governed by the New York Civil Practice Act and Rules and the cases appendent thereto. Under New York Practice time does not commence to run until Notice of the Entry of an Order is given to a party. If such notice if given by mail, three days are added. See, for example, Skrine vs. Staiman, 290 NYS(2nd) 118; Jankow vs. Williams, 252 NYS (2nd) 785; Koppelman vs. Schuckman, 240 NYS(2nd) 678 and Smith vs. Helbraun, 240 NYS(2nd) 492.

The second case cited by the Appellee, Sonnenblick vs. Nowalk, 420 Fed(2nd) 858 is a special case since it involves the time for appeal from an order. This time is set by statute as the time from the date of entry of the order and, as a result, lack of notice by the Clerk of the Court cannot affect the time.

POINT TWO

PROPER SERVICE OF THE ANSWERS OF RANDOLPH AND OF THE INDEPENDENT INVESTOR PROTECTIVE LEAGUE WAS MADE BY SEPTEMBER 5th, 1974 AND THUS THE ORDER OF THE COURT WAS COMPLIED WITH.

The Appellee takes an inconsistent position in this case. It first claims that plaintiffs did not comply with the Order of the Court because service of interrogatory answers of RANDOLPH and of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE were not served in time. It then claims that the service of answers on September 5th, 1974 (concededly timely) constituted a "fraud" upon the Appellee (even though no prejudice was shown). The Appellee cannot have it both ways. We have demonstrated, in the Appellants' main brief, that the unconformed copies served on September 5th, 1974 constituted valid service even though they were, in fact, so unconformed. The Appellants have demonstrated that the answers of RANDOLPH were actually executed on September 3rd, 1974 (two days prior to the service on the Appellees' attorney,) Under the laws of the State of New York, which are substantive in nature) a document sepaks from the date of service and not from the date of receipt. See, for example, R.E. Associates, Inc. vs. McGoldrick, 278 App. Div. 347; Loman vs. Loman, 91 NYS(2nd) 601; Weingarten vs. Cohen, 275 App. Div. 253; Jackson & Perkins Co. vs. Rose Fair, Inc., 278 App. Div. 890; Tappis vs. National Van Lines, Inc., 250 NYS(2nd) 466; Manitt Construction Corp. vs. U.S. Plumbing and Heating Corp., 270 NYS(2d) 716 and Rosenberg vs. Wickham, 313 NYS(2nd) 307.

Thus the RANDOLPH answers were validly served in time and the hearings held by the Court were improper.

We come now to the Answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE. These answers were, of course, also served in time. (The question of the date of execution of these answers is, of course, irrelevant, since even if it be assumed, arguendo that the date of execution was between September 5th and September 10th, 1974 there was no prejudice to the Appellee by reason of the delay. Furthermore, of course, the League's secretary SANDS ratified the execution of the documents involved by his testimony at the hearings before the District Court. Thus, even if the plaintiff's attorney served copies of papers which had not been executed by SANDS on September 5th, 1974, SANDS subsequent execution of the answers involved would constitute proper ratification. See, for example, the normal agency cases of Pullen vs. Dale, 109 Fed (2nd) 538; Equity Mutual Insurance Company vs. General Casualty of America, 139 Fed(2nd) 72[illegible], Davies vs. Lahann 145 Fed(2nd) 656; and Standard Oil Company of Texas vs. Manley, 178 Fed(2nd) 136.

At the time of the hearings before the District Judge the undersigned believed that FAGAN had not returned his signed answers to interrogatories. It now transpires (see affidavit of FAGAN in papers in support of application to remand) that FAGAN did, in fact, execute proper answers to interrogatories on August 30th, 1974 and mailed them to the plaintiffs' attorneys. Thus, of course, the service of the FAGAN answers is likewise

valid wand was performed in time. While it is true that the original FAGAN answers were not received by the plaintiffs' attorneys, there is no question at this time, based on the FAGAN affidavit, that they were, in fact, executed on August 30th, 1974 and should have been received by the plaintiffs' attorneys on September 2nd, 1974. This fact, of course, ratifies the "service" of copies thereof on September 5th, 1974 and there is no default.

While GARY MICHAEL did not send his signed copies of answers to the plaintiffs' attorneys until September 16th, 1974 (Seven days late) and made minor inconsequential changes in the answers, he was never a plaintiff in this action at the time and therefore any action taken by him is irrelevant.

POINT THREE

THERE WAS NO WILFUL REFUSAL TO MAKE DISCOVERY ON THE PART OF ANY PLAINTIFF IN THIS ACTION AND SANCTIONS ARE THEREFORE NOT APPROPRIATE.

This point was well covered in the main brief of Appellant. However, since that time, the conduct of the Appellee's attorney indicates the fact more clearly.

The original RANDOLPH answers to interrogatories were inaccurate with respect to his purchases and sales of TELEPROMPTER STOCK. This was pointed out by the Appellee's attorney on the argument of the Rule 37 motion. Therefore, on

September 17th, 1974 a complete record of RANDOLPH's purchases and sales of TELEPROMPTER STOCK was annexed to the record (JA-565-578). When a Class was finally certified in the consolidated action in this Court the purchasers making purchases of TELEPROMPTER STOCK as set forth by RANDOLPH in his Answers to Interrogatories were not included. When it was pointed out to this Court that if RANDOLPH were bound by his original answers he could not be included in the Class certified by Judge Mac Mahon the Appellee's attorney, in an affidavit, set forth the following:

> "* * * Included as part of the record on appeal in this case is a letter from Randolph with respect to his Teleprompter stock-holdings and the confirmation slips with respect thereto. That letter and those slips were presented to the District Court by Mr. Bader. Copies of the letter and the relevant slips are annexed hereto. The confirmation slips show that Randolph purchased 100 shares of Teleprompter stock on May 1, 1973. This is within the class as defined.* * *"

The Appellee's attorney then goes on to state the following:

> "* * * In addition, plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE purported to represent other stockholders whose purchases of Teleprompter stock fell within the class as defined by Judge MacMahon.* *"

Thus the information requested with respect to stockholdings (so important to the Appellee) was fully supplied.

This, of course, does not constitute any wilful failure to make discovery and sanctions were not appropriate.

POINT FOUR

GARY MICHAEL WAS NOT A PLAINTIFF IN THIS ACTION ON SEPTEMBER 5th, 1974.

The point was set forth with particularity in the Appellants' main brief. In response the Appellee states that the Appellant's attorney considered GARY MICHAEL to still be a plaintiff in this action. This was due to the confusion of names between GARY MICHAEL and MICHAEL FAGAN. However, regardless of the position of counsel, it is clear that the name of MICHAEL FAGAN was dropped from the caption of the Amended Complaint and, as the decisional law sets forth, a specific order to drop a party is unnecessary.

POINT FIVE

THE DISTRICT JUDGE ACTED AS A WITNESS IN THIS PROCEEDING IN VIOLATION OF DECISIONAL LAW AND OF RULE 605 OF THE FEDERAL RULES OF EVIDENCE WHICH CODIFIES THE PRIOR LAW

By making fact finds as to what went on before him on the argument of a Motion (where no stenographic record was taken) and by placing his confidential notes into the record (JA-597-598) the District Judge proceeded in violation of Rule 605 of the Federal Rules of Evidence. This rule reads as follows:

> " * * * The judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve this point.

The Advisory Committee's notes on the proposed rule states the following:

> " * * * The rule provides an automatic objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.* * *"

Prior to the adoption of the Rule the result was the same. The cases are collected in 157 ALR 311. See also Glasser vs. US, 315 US 60; Lepper vs. US 233 Fed. 227; Terrell vs. US, 6 Fed.(2nd) 498.

In the case at Bar the District Judge used his confidential notes to establish certain "facts" and made the notes a part of the record as Court Exhibit S. This causes an immediate reversal under the cases. Indeed, such action on the part of District Judges, if permitted to stand, would permit parties, in any case pending before a Judge, to require the Judge to deliver his confidential notes to the litigants and would make a mockery of the impartiality of the District Judge preventing him from performing his duties to ascertain the facts.

POINT SIX

SINCE THERE WERE CONTESTED ISSUES OF FACT IN THIS CASE PLAINTIFFS WERE ENTITLED TO A JURY TRIAL.

In answer to the Seventh Amendment point in the Appellants' main brief the Appelees state (1) the plaintiffs waived a Jury Trial by failing to make a demand before the District Judge,(2) the Court may proceed with respect to the question of failure to comply with an Order (Contempt in the Debs case cited by the Appellee). The Appellees are wrong on both counts.

Since the hearing before the Court involved a Rule 37 problem (which is a question of law) there was no need to repeat a demand for jury trial. The plaintiffs had demanded a jury trial as required and need not reiterate this demand at every stage in the proceeding. Obviously, also, in normal cases, the compliance or lack of compliance is determined by papers and there are no contested issues of fact in the case.

Had the Court simply determined non-compliance with his order the question would not have come up. But the District Judge went further. He accused the Secretary of the Plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE of making claims which were "false". He "rejected" the testimony of SANDS and of BADER. He recommended disciplinary action for BADER for the making of "false statements" and the giving of "false testimony". Thus he

in effect, conducted a trial of an issue of fact. This could not, of course, be done without properly advising the Appellants of their right to a jury trial. The Appellants could then, after such advice, avail themselves of such right.

The Debs case cited by the Appellee, is a Criminal Contempt matter and, as previously pointed out, is now subject to jury trial provisions.

POINT SEVEN

SINCE THE APPELLEE SUBMITTED AN ADMITTEDLY FALSE AFFIDAVIT IN THIS PROCEEDING, HALF TRUTHS WERE PRESENTED TO THE COURT, AND CLAIMED FALSE TESTIMONY IS INVOLVED THE APPELLEE IS GUILTY OF UNCLEAN HANDS AND IS NOT ENTITLED TO ANY RELIEF IN THIS PROCEEDING

The provisions of Rule 37 with respect to payment of expenses read as follows:

> "* * If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses in obtaining the order, incuding attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.* *(emphasis supplied).

That the opposition to the motion was substantially justified is clear from the papers and need not be further argued here. However the last clause obviously includes the

question of "unclean hands".

This Court, and others, have always considered "unclean hands" to bar relief even where otherwise justified. In Kama Rippa Music, Inc. vs. Schekuyck, 2 Cir.,510 Fed(2nd) 837 (844) this Court said:

> "* * *In addition since equity's distaste for forfeitures is almost certainly matched by its repugnance for petitioners beseeching its aid with "unclean hands" * * * there should be little question that the plea to equity of a party which attaches its own indebtedness as a ploy to avoid its contractual duties will fall upon deaf ears.* * *"

See also, Irving vs. Gray, 479 Fed(2nd) 20 and Jack Winter, Inc. vs. Koratron Co., Inc. 375 Fed. Supp. 1.

The affidavit involved is admittedly false. It is false in a material manner since, if it were true, it would be clear that the statement by BADER that the individual answers were mailed out by SANDS without authority or knowledge on his part would have to be false. BADER swore that the Answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE were mailed to all attorneys by him and, if the Appellee's affidavit were correct, BADER would obviously not be correct. The District Judge, almost certainly, saw this problem since in his opinion (JA-A-26,A-27) he stated the following:

> "* * * As this motion involved serious allegations, I held hearings on November 9,13 and 14 1974.* * *

It is to be noted that, prior to the hearings, there was no question that the answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE were mailed in accordance with the Order of the Court. Hence the false affidavit caused serious prejudice to the Appellant.

The Appellee contends that (1) the affidavit was corrected, (2) the Court found as facts the contentions of the Appellants and therefore no prejudice was shown.

At the outset it is pointed out that the affidavit was not corrected (even though the Appellee had admitted knowledge of its falsity earlier) until the "tail end" of the hearings. Secondly it still was not fully corrected since the "correction testimony" also claimed that the Appellee's attorney did not know whether all of the individual answers came in the smaller envelope produced. This, it is submitted, is just not so.

Large firms of attorneys normally keep all envelopes in which documents are received with the papers in which they come so as to validate the post-mark on the papers. It is inconceivable that this was not done in the present case. Furthermore, if it was an inadvertent error then it was incumbent on the Appellee's attorneys to present "live testimony" as to the manner in which the error occurred. This, of course was not done.

It is also admitted that the Appellee's attorney, in another affidavit, set forth certain "facts" as to the receipt

of a letter mailed from a letter-box in San Diego California to New York after 5PM on September 3rd, 1974. It is claimed that this affidavit was true. If so, of course, it was a half truth because RANDOLPH stated, in his affidavit, that he mailed the papers at about 1PM on September 5th, 1974 from the Andrew Jackson Post Office in San Diego California. Thus the affidavit involved was, of course, a clear non-sequitor. The only purpose of that affidavit would be to confuse the Court and this, it is submitted, likewise constitutes unclean hands.

Finally the Appellee contends that the affidavit with respect to statements made at a hearing before Judge Owen by BADER (which is claimed to be false and not borne out by the Judge's notes) is, in fact true. This again is not correct.

The Judge's notes involved show an arrow with two points (JA 597) which connect the sentences "Knew on 9th that --- Sands said". It is obvious that the double arrow would not have been placed in the notes unless the sentences were to be corrected. Thus the affidavit involved is false.

[Parenthetically, of course, the only party who can resolve this issue is the District Judge and that is the reason why he is a "witness" in the case and that is why there is reversible error in any event].

There are, of course, many inconsistencies between the Judge's notes and the memorandum of the Appellee's attorney as to what actually was said at the hearing before Judge Owen. For example there is no statement in the ENO MEMORANDUM to the effect that BADER "did an awful lot of investigating" which appears in the Judge's notes (and is obviously correct).

The Judge's notes indicate that BADER said that the RANDOLPH answers came in the 3.00 mail which is again correct. The ENO MEMORANDUM on the other hand, states that BADER stated that he left the office at 3PM.

Based on the above, it is submitted, that, in any event, there is no ground for sanctions to be imposed upon the Appellants.

POINT EIGHT

THERE WAS NO FALSE TESTIMONY GIVEN BY THE APPELLANTS IN ANY MATERIAL MATTER IN THIS PROCEEDING.

The Appellee, even though it is clear that false testimony and false affidavits were submitted in its behalf, constantly characterizes the evidence submitted by the Appellants as "contrived", "Bizarre" etc. It is, of course, none of these things but is completely true. The fact that the Appellee does not "like" this evidence does not detract from its truth. Indeed, the Appellee's own evidence, in many cases, bears out

the facts.

On September 5th, 1974 the Appellants' attorney BADER was involved in serious problems with his partner, Mr. Scher and his office staff. On page 152 of the Joint Appendix the following Appears:

> "A. No, sir. As a matter of fact, I had a terrible amount of trouble with his secretaries. He really picks winners. And the last secretary that we had--that he had--is a woman who in my opinion was crazy.
>
> THE COURT: All right. We don't need to get into that.
>
> A, Okay. But I just wanted to tell you that I have a tremendous problem not only with the other secretary but with this secretary. I can't get her to give me the right time.

The secretary involved had the effrontery to give to the Appellee's attorney NEVLING, the name of my Secretary DOROTHY BLACKER. This appears in page 143 of the Joint Appendix as follows:

> Q. You saw the lady who just testified?
>
> A. Yes.
>
> Q. Who gave her name as Mrs. Blacker. Was this the lady who identified herself as Mrs. Blacker.
>
> A. No.
>
> Q. Will you describe the lady who identified herself to you as

Mrs. Blacker, as best you can recall?

A. Well, she was shorter than the woman who just testified, she had a different hair-do and quite different appearance. I think she was a little older than the woman who testified here today. She had different facial appearance.

Q. She just was not the same woman at all?

A. That's right.

This secretary, as indicated by the testimony of BLACKER and of the mailman LA PORTA, was the "office receptionist" who was in charge of the office mail.

At the same time that this was going on I was about to terminate my association with my partner SCHER. This appears on page 151 of the Joint Appendix. The association was actually terminated on December 31st, 1974 (JA-443).

At the same time my own secretary DOROTHY BLACKER was notified of her termination of employment on December 31st, 1974 by reason of my pending move of my offices to White Plains New York. (My principal office is now at 65 Court Street, White Plains, New York).

Dorothy Blacker was also peculiar in refusing to furnish her telephone number to me. This appears on page 100 of the Joint Appendix as follows:

Q. Did you ever give him your phone number?

A. No, I didn't

These facts are submitted to indicate the serious office problems which existed at that time and explains the testimony that the Appellee calls "bizarre".

An explanation can now be furnished as to why the interrogatory answers of the party FAGAN which were concededly mailed on August 30th, 1974 never reached my office. It is possible that the "false" Mrs. Blacker who clearly had poor eyesight, just never delivered them to the Appellant's attorney.

The next question involves the reason why SANDS was asked to come to Connecticut to verify interrogatory answers when, in fact, GORDON, having a New York Office could have done so. The explanation appears on page 451 of the Joint Appendix the following appears: [Affidavit of MERRILL SANDS].

> "* * * Finally I wish to point out that one of the questions in the interrogatories of the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE related to the membership list of the league. I am secretary of the League and control its membership list. Mr. Gordon does not. Thus it was necessary that I verify the answers to interrogatories relating to the membership list and Mr. Gordon could not.* *"

The explanation of the need to have SANDS verify the answers is thus made. Indeed, one of the claims made by

the Appellee as to the need for further interrogatory answers related to questions relating to the membership list of the League.

The Appellee contends that the SANDS testimony was carefully contrived so that he would avoid DOROTHY BLACKER on September 5th, 1974. Actually, of course, the importance in getting work out when DOROTHY BLACKER is in the office more than explains the matter. BLACKER testified as to her work load as follows: (JA- 101)

> Q. You don't manage the files?
>
> A. I don't think I have ever been to the files; maybe once or twice. I mean there is that much stenographic work and Dictaphone work.

Also, of course, there is full substantiation relating to all material matters involved in the case. Any incorrect statements relate to non-material questions (i.e. whether BADER's secretary mailed the IIPL answers or SANDS did so, the precise conversation between BADER and ENo, etc.

The law is clear, of course, that immaterial variations of facts are not important.

POINT NINE

THERE IS NO QUESTION THAT THE INTERROGATORY ANSWERS OF THE INDEPENDENT INVESTOR PROTECTIVE LEAGUE WERE VERIFIED ON SEPTEMBER 5th, 1974 AND THERE IS NO PROBATIVE EVIDENCE TO THE CONTRARY

The District Judge, in his opinion, rejected the testimony of both BADER and SANDS to the effect that the interrogatory answers of the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE were verified on September 5th, 1974. He then accepted the testimony of MRS. BLACKER to the contrary. Based upon what he claimed were inconsistencies he then termed the testimony of BADER and SANDS "false". There is no probative evidence to support this finding which is "clearly erroneous".

The Appellants summarize the testimony of MRS. BLACKER only that she could not remember and her testimony is not inconsistent with the testimony of BADER and SANDS.

SANDS testified (JA 67-68)as follows:

> Q. Will you tell me what transpired [on September 5th 1974]
>
> A. Well, we talked a little bit about Teleprompter and he said he had to have these--gave me the papers to sign on behalf of the League, which I did.* * *"

BADER testified (JA 6,7) as follows:

> Q. The original of these answers, were they signed by Mr. Sands?
>
> A. Yes, Sir.
>
> Q. Were you the Notary Public who took his signature?
>
> A. Yes, Sir.

Q. Did you take his signature on September 5th, 1974?

A. Yes, Sir.

BADER further testified as to the reason for a typed September 5th, 1974 date on the answers as follows:

(JA 193-194)

THE WITNESS (Mr. BADER): All right, I want to make a statement to the court with respect to the testimony yesterday of Mrs. Blacker.

There is a September 5th date on the answers to interrogatories signed by Mr. Sands of the Independent Investor Protective League. With respect to that my best recollection is that I requested Mrs. Blacker to draw those interrogatory answers on the 4th, and that I asked her to put the 5th date in the answers because of the fact that Mr. Sands was expected at my office the next day to sign them.

BLACKER did not contradict this. She testified as follows: (JA 119)

Q. You don't remember?

A. September 5th doesn't mean a thing to me, nothing at all.

Later on she testified that her normal practice would be to put that date on a document as the typed date unless otherwise instructed. This appears on page 141 of the Joint Appendix as follows:

THE COURT: Very good.

I assume it would be because somebody had given you instructions to date the instrument some other date?

A. That would be right, Yes.

Q. Do you have any recollection of being instructed to date Exhibit A some other date than the date upon which you typed it?

A. No, Your Honor.

The Court, throughout the testimony of BLACKER attempted to "jog her memory" to enable her to recall the events of September 5th, 1974. This was unavailing and BLACKER consistently testified that "she just did not remember". BLACKER did admit that, at least, on some occasions, she did put a date on documents other than the date typed. This appears on page 140 of the Joint Appendix as follows:

THE COURT: Do you customarily put upon a piece of paper that you type the date upon which you weren't typing it?

A. Very, very rarely * * *"

Thus, of course, there is no contradiction between the testimony of SANDS and of BADER and the testimony of BLACKER. True BLACKER does not <u>confirm</u> this testimony but she does not contradict it either. For the Court to use this testimony to base a finding of "falsehood" upon SANDS and BADER is "clearly erroneous".

In addition, of course, as shown by the affidavits

on the Motion to Remand BLACKER was notified of the termination of her employment with BADER as of December 31st, 1974. That this fact affected her testimony cannot be denied.

POINT TEN

EVEN ASSUMING FAILURE TO SERVE PROPER ANSWERS TO INTERROGATORIES ON SEPTEMBER 5th, 1974 AND EVEN ASSUMING THAT THE LAST DATE FOR COMPLIANCE WAS SEPTEMBER 5th, 1974 THE COURT ERRED IN FAILING TO AUTOMATICALLY EXTEND TIME FOR COMPLIANCE WHERE NO PREJUDICE ON THE ADVERSE ATTORNEY WAS SHOWN.

It is clear, from the record, and the correspondence of the Appellee's Attorney, that the copies of interrogatory answers served on September 5th, 1974 (other than the copies of the Answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE) were unconformed draft copies. We will assume, arguendo, that such service was a nullity. The record shows no prejudice to the Appellee or his attorney by reason of the late service and, indeed, the Appellee's attorney further admits that he might have granted an extension of time if the Appellants had asked for it. This appears on page 215 of the Joint Appendix as follows:

Q. In other words, you might have given me an extension of time?

A. I can't tell you now what I would have done then.

Q. But you might have?

A. It is conceivable that I might have, yes.

The NEVLING testimony on the September 11th conversation with BADER is also significant. This appears on page 203 of the Joint Appendix as follows:

Q. Did he [Mr. Bader] make any statements to you in connection with that at the time he gave them to you?

A. He said that he was not going to give us any extension of time on anything henceforth and said that the other defendants could have additional time but that we could not have additional time. But I believe then that he qualified that and said that if we would give him an extension of time to serve answers to interrogatories he would be willing to give us an extension of time on all discovery until some decision had been reached on our motion to dismiss his complaint.

The telephone record of the conversation between the attorney for the Appellants and the Attorney for the Appellee on September 9th and 10th, 1974 also indicates a willingness on the part of the Appellants' attorney to give the Appellee any extension of time necessary by reason of the late service of further Answers to Interrogatories.

Thus, it is clear, that the Appellants' Attorney always acted in good faith and therefore would be entitled to an extension of time under the Rules.

The cases support this proposition, particularly

where no prejudice is shown. In addition to the cases cited in Appellants' main brief the Court's attention is respectfully directed to Priest vs. Rhodes, 56 FRD 478 [late filing of Jury demand permitted even though the District Court rejected the claim of an additional three days time made by the plaintiff.]

Furthermore, the failure to permit the late filing of the answers involved would work a substantial prejudice on innocent thrid parties. RANDOLPH obviously did not intend to wilfully refuse discovery and returned his signed answers to the Appellants' Attorneys in time for them to have been received in time to comply with the Order. FAGAN returned his signed copies of answers to interrogatories in time for them to have been received by the attorney for the Appellants. The INDEPENDENT INVESTOR PROTECTIVE LEAGUE is a membership organization and, as appears from the recent affidavit submitted to this Court by the Appellee's attorney the Appellee takes the position that the dismissal of this action with prejudice is binding on all of the members of tne League. Thus, even though such League members are included in the Class certified by Judge MacMahon their claims are dismissed with prejudice by reason of circumstances completely beyond their control. Obviously this should not be permitted.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE IN ALL RESPECTS REVERSED, OR, IN THE ALTERNATIVE, THIS APPEAL SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

Dated : May 3rd, 1976

Respectfully submitted

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